IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.422 of 2006

Decided on : June 14, 2007

Shambu and another **....Appellants.**

VERSUS

State of Himachal Pradesh **....Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellants : Mr. Ajay Sharma, Advocate.

For the respondent : Mr. Ashok Chaudhary, Additional Advocate General.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellants alongwith four other persons, who have not filed any appeal, stand convicted of offences under Sections 395 and 397 IPC and sentenced to undergo imprisonment for seven years and to pay a fine of Rs.10,000/- each in respect of offence under Section 397 IPC and to undergo imprisonment for five years and to pay a fine of Rs.10,000/- each, in respect of offence under Section 395 IPC.

3. Prosecution case, as it emerges from the record of the trial Court, is like this. On the night intervening 27th and 28th October, 2003, PW-3 Subhash Chand alongwith his wife PW-4 Indira Devi and daughter PW-7 Priyanka was sleeping in the verandah of his house when six persons with muffled faces went there. They dealt severe blows of some blunt weapon on the heads of PW-3 Subhash Chand

---

Whether the reporters of the local papers may be allowed to see the Judgment?

and his wife PW-4 Indira, as a result of which they became unconscious. However, before becoming unconscious they raised cries of *Bachao-Bachao*, on which their daughter PW-7 Priyanka, then aged about 9 years, woke up. The assailants then removed a pair of ear-rings worn by PW-4 Indira Devi. They then entered the house of the couple and picked up a trunk (steel box) believing that it contained cash and valuables and escaped with that trunk. After the assailants left the house of PW-3 Subhash Chand, PW-7 Priyanka went to the house of a neighbour named Kashmir Singh PW-9 and apprised him of the incident, who in turn informed the Police. Police reached the spot and recorded the statement of Subhash Chand, under Section 154 Cr.P.C., on the basis of which formal FIR was registered. Subhash Chand and Indira Devi were taken to the hospital for treatment. Certain injuries were found on their persons by the doctor, who conducted their medico legal examination. All the six assailants were arrested by the Police of an adjoining Police Station in another case of decoity. The assailants got recovered some *Dandas*. It appears that during the course of their interrogation by the Police of the adjoining Police Station they confessed to having committed the decoity in the house of PW-3 Subhash Chand. Therefore, the SHO of the Police Station within whose jurisdiction Subhash Chand lives was informed by the SHO of the adjoining Police Station. The former SHO got the custody of the six assailants transferred by the order of the concerned Judicial Magistrate. The assailants were interrogated. One of the assailants, named Anju (not an appellant in this case) made a disclosure statement leading to the

recovery of one *Kulhari* (an axe), which was used in the commission of the crime. Another assailant named Deepak, who is also not an appellant in the present appeal, also made a disclosure statement leading to the recovery of iron rods. Another assailant named Kamal, who too has not filed any appeal, made a disclosure statement leading to the recovery of a pair of ear-rings.

4. Trial Court has disbelieved the prosecution version with regard to the disclosure statements by the aforesaid three accused persons, who have not appealed, and the recovery of the axe, iron rods and the pair of ear-rings. Trial Court has convicted the appellants and the four other alleged assailants named Anju, Ranjiti, Deepak and Kamal, on the basis of the testimony of PW-7 Priyanka, the daughter of the injured couple. This witness stated during the course of the trial that she was called to the Police Station after the occurrence and there all the six assailants were shown to her and she identified them to be the same persons who had entered their house and given beatings to her parents and taken away the ear-rings of her mother and the trunk (steel box) from their house.

5. Appellants' contention is that the testimony of PW-7 regarding the identification of the appellants and their accomplices, for the first time during the course of the trial, is a very weak type of evidence. It is submitted by the learned counsel that when it has come in the evidence of PW-3 Subhash Chand, PW-4 Indira Devi and PW-7 Priyanka herself that the faces of the assailants were muffled, how could PW-7 Priyanka have identified the assailants. Also, it is his submission that in the first instance the identification of an accused at

the Police Station is not a valid and lawful test identification and then the testimony of PW-7 Priyanka about her having identified the assailants at the Police Station is not corroborated by the Investigating Officer of the case or any other police official.

6. I have been taken through the testimony of the material witnesses. The learned Additional Advocate General does not dispute the finding of the trial Court that the recovery of the axe, iron rods and a pair of ear-rings, allegedly at the instance of some of the accused (other than the appellants), does not stand proved and that the evidence is of doubtful nature. He, however, submits that the appellants and their four accomplices, who have not appealed, stand identified by PW-7 Priyanka. He has submitted that it was only PW-7 Priyanka who was in a position to identify the assailants because her parents had been hit on their heads when they were in sleep and immediately on being hit they became unconscious and had no occasion to see the assailants. The submission cannot be accepted, because both PW-3 Subhash Chand and PW-4 Indira Devi have stated that they had seen the assailants but their faces were muffled. PW-7 Priyanka also says that the faces of the assailants were muffled. Now, when the faces of the assailants were muffled and the crime was committed in the darkness of night, it cannot be said that PW-7 Priyanka was in a position to identify the assailants.

7. From the abovestated position, it is clear that the case of the prosecution does not stand established not only against the present appellants, but even against those of their accomplices who have not appealed against their conviction and sentence. Now, the

question arises whether the convicts, who have not appealed against the order of conviction and sentence, can be rendered the benefit of this finding and their conviction and sentence set aside, under the law. I am of the considered view that in exercise of its inherent power, under Section 482 of the Code of Criminal Procedure, the High Court with a view to serving ends of justice can set aside the conviction and sentence of even those persons, who though do not file any appeal against the conviction and sentence, are found to be innocent on re-appraisal of the evidence, in appeal filed by some of their co-convicts. The Hon'ble Supreme Court in ***Bijoy Singh and another vs. State of Bihar, (2002) 9 SCC 147,*** has held, even though without reference to the provision of Section 482 of the Code of Criminal Procedure, that where on evaluation of the case if the Court reaches the conclusion that no conviction of any accused is possible, the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an appeal.

8. In view of the abovestated position, appeal is accepted. The judgment of the trial Court convicting and sentencing the appellants, as also those of the convicts who have not filed an appeal, is set aside. Consequently, the appellants and their accomplices are acquitted. They, being in jail, serving out the sentence in this case, are ordered to be released forthwith, in case their detention is not required in any other case.

9. Appeal stands disposed of.

June 14, 2007(sd) **(Surjit Singh), J.**